Brinker International Payroll Company L.P. *and* The Sawaya & Miller Law Firm. Case 27–CA–110765

June 11, 2021

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

On December 1, 2015, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing a mandatory individual arbitration policy. *Brinker International Payroll Co. L.P.*, 363 NLRB No. 54. Applying the analysis set forth in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found the mandatory arbitration agreement unlawful on the basis that it required employees, as a condition of employment, to waive their right to pursue class or collective actions in any forum, whether arbitral or judicial. *Brinker International Payroll*, supra, slip op. at 1. The Board also found the agreement unlawful because employees reasonably would believe that it bars or restricts their right to file unfair labor practices with the Board. Id., slip op. at 1 fn. 1.

The Respondent filed a petition for review with the United States Court of Appeals for the Fifth Circuit. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis,* 584 U.S. ___, 138 S.Ct. 1612, 1632 (2018).

On June 19, 2018, the Fifth Circuit denied enforcement of the portion of the Board's Order governed by *Epic Systems* and remanded the remainder of the case for further proceedings before the Board. On December 16, 2020, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge to decide the remaining issue under the standard set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), discussed below. The Respondent filed a statement of position, opposing remand. The General Counsel filed a statement of position stating that it did not oppose remanding the proceeding. Because no party has presented arguments in favor of a remand and the remaining allegation may be decided based on the existing record, we find that a remand is unnecessary.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered its previous decision and the record in light of the General Counsel's and the Respondent's statements of position. For the reasons set forth below, we find that under *Boeing* and its progeny, the Respondent's mandatory arbitration agreement unlawfully restricts employee access to the Board and its processes. Accordingly, we conclude that the Respondent violated Section 8(a)(1) of the Act by maintaining the mandatory arbitration agreement.

Background

Since at least January 7, 2013, the Respondent has maintained an Agreement to Arbitrate ("the Agreement"), which employees are required to sign as a condition of employment. The Agreement provides, in relevant part:

> Because of, among other things, the delay and expense which result from the use of court systems, any legal or equitable claims or disputes arising out of or in connection with employment, terms and conditions of employment, or the termination of employment with Brinker will be resolved by binding arbitration instead of in a court of law or equity. This agreement applies to all disputes involving legally-protected rights (e.g., local, state and federal statutory, contractual or common law right(s) regardless of whether the statute was enacted or common law doctrine was recognized at the time this agreement was signed. This agreement does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC) . . . .
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> This Agreement to Arbitrate substitutes one legitimate dispute resolution form (arbitration) for another (litigation), thereby waiving the right of either party to have the dispute resolved in court.

Discussion

Although the Supreme Court in *Epic Systems* emphasized that arbitration agreements are to be enforced as written pursuant to the FAA, the Court has also held that this mandate "may be 'overridden by a contrary congressional command.'" *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 5 (2019) (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). In *Prime Healthcare*, the Board explained that Section 10 of the Act establishes just such a contrary congressional command with respect to arbitration agreements that interfere with the right of employees

to file charges with the Board. Specifically, the Board explained that under Section 10(b) of the Act, the Board has no power to issue complaint unless an unfair labor practice charge is filed, and Section 10(a) of the Act relevantly provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Thus, notwithstanding the Supreme Court's decision in *Epic Systems*, the FAA does not authorize the maintenance or enforcement of agreements that interfere with the right to file charges with the Board. Id.

An arbitration agreement that "explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful." Id. Where an arbitration agreement does not contain such an express prohibition—i.e., where the arbitration agreement in question is facially neutral—the Board applies the standard set forth in *Boeing* and determines "whether that agreement, 'when reasonably interpreted, would potentially interfere with the exercise of NLRA rights,'" i.e., the right to file charges with the Board. Id. (quoting *Boeing*, 365 NLRB No. 154, slip op. at 3). Such interference exists when an arbitration agreement, "taken as a whole, make[s] arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." Id., slip op. at 6 (emphasis in original). Further, "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id.

Here, the Agreement requires that employees arbitrate "any legal or equitable claims or disputes" arising out of or concerning employment, terms and conditions of employment, and termination from employment. Without more, such language makes arbitration the exclusive forum for resolving all disputes between the Respondent and any of its employees, including claims brought under the Act, thus restricting employees' access to the Board and rendering the Agreement unlawful. See, e.g., id.; *Dish Network, LLC,* 370 NLRB No. 97 (2021) (finding unlawful an agreement requiring arbitration of "any claim, controversy, and/or dispute . . . arising out of and/or in any way related to . . . employment"); *Century Fast Foods, Inc.*, 370 NLRB No. 4, slip op. at 3–4 (2020) (finding unlawful an agreement requiring that "any claims" be resolved by arbitration); *IIG Wireless, Inc. f/k/a Unlimited PCS, Inc.*; *and UPCS CA Resources, Inc.,* 369 NLRB No. 66, slip op. at 2 (2020) (finding unlawful an agreement requiring that "any dispute or controversy . . . arising from or in any way related to my employment with the Company, shall be submitted to and determined by binding arbitration"); *Beena Beauty Holding, Inc. d/b/a Planet Beauty*, 368 NLRB No. 91, slip op. at 2–3 (2019) (finding unlawful an agreement requiring employer and employees "to submit any claims that either has against the other to final and binding arbitration").

In decisions subsequent to *Prime Healthcare*, however, the Board made clear that the analysis does not end there if the challenged arbitration agreement includes a savings clause, i.e., a clause providing that employees "retain the right to file charges with the Board, even if the agreement otherwise includes claims arising under the Act within its scope." *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123, slip op. at 3 fn. 3 (2019). Thus, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020), and *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), the Board found that the agreements at issue, which required arbitration of claims arising under the Act, were nevertheless lawful because they contained savings clauses that explicitly informed employees that they retained the right to file charges with the Board and access its processes.[1] The Board has also indicated that a savings clause may be legally sufficient, even if it does not expressly refer to "the National Labor Relations Board," "the NLRB" or "the Board," if it informs employees of their right to file claims or charges with administrative agencies generally.[2] The Board examines savings-clause language in the context of the arbitration agreement as a whole to ensure that the right of employees to access the Board and its processes is adequately

[1] The arbitration agreement in *Anderson Enterprises* contained a savings clause providing that "[c]laims may be brought before an administrative agency . . . . Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board. . . ." 369 NLRB No. 70, slip op. at 1. The arbitration agreement in *Briad Wenco* contained a savings clause providing that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including . . . the National Labor Relations Board. . . ." 368 NLRB No. 72, slip op. at 1.

[2] See *Haynes Building Services, LLC*, 369 NLRB No. 2, slip op. at 3 (2019) (agreement at issue "did not contain a savings clause preserving employees' right to file charges with the Board or with administrative agencies generally"); *E. A. Renfroe & Co.*, 368 NLRB No. 147, slip op. at 3 (2019) (agreement at issue "[did] not contain a savings clause preserving employees' right to file charges with the Board or, more generally, with administrative agencies"); *Beena Beauty Holding, Inc. d/b/a Planet Beauty*, supra, slip op. at 2 (arbitration agreement at issue "contained no exception for filing charges with the Board or other administrative agencies"); *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, slip op. at 3 (2020) (finding legally sufficient to preserve employees' right of access to the Board savings-clause language stating that employees who sign arbitration agreement "are not giving up . . . the right to file claims with federal . . . government agencies").

safeguarded. *20-20 Communications, Inc.*, 369 NLRB No. 119, slip op. at 2–3 (2020).

In *Century Fast Foods*, supra, the Board held that a savings clause that referred to "complet[ing] any external administrative remedy (such as with the Equal Employment Opportunity Commission)" did not "sufficiently safeguard employees' right to file unfair labor practice charges with the Board." 370 NLRB No. 4, slip op. at 3–4 (2020). While ultimately finding the agreement unlawful because it imposed a condition precedent to the filing of Board charges,[3] the Board noted that in examining this savings-clause language, "we doubt that a reasonable employee 'aware of his legal rights' would read this language to encompass filing a charge with the Board, rather than, as stated, with the EEOC." Ibid. Here, we are presented with nearly identical savings-clause language, and accordingly find that the clause does not sufficiently apprise employees of their right to file charges with the Board.[4]

In sum, the language of the Agreement to Arbitrate, when reasonably interpreted under *Boeing*, makes arbitration the exclusive forum for resolution of claims arising under the Act, and the savings-clause language is legally insufficient. The Agreement restricts employee access to the Board, and such restriction of Section 7 rights cannot be supported by any legitimate business justification. Therefore, we place the Agreement in *Boeing* Category 3, and we find that the Respondent violated Section 8(a)(1) of the Act by maintaining it.[5]

[3] The Board determined in *Century Fast Foods* that "*even assuming* the language about completing any administrative remedy *could be* reasonably interpreted to include the filing of unfair labor practice charges with the Board, the Agreement interferes with the exercise of that right by imposing mandatory preconditions on the filing of such charges." Ibid. (emphasis added.)

[4] Member Emanuel emphasizes that the savings clause in this case was insufficient because of its vague reference to "an employee's ability to complete any external administrative remedy (such as with the EEOC)" and not because of its failure to specifically name the National Labor Relations Board.

Chairman McFerran agrees with her colleagues that the Agreement's vague reference to "an employee's ability to complete any external administrative remedy (such as with the EEOC)" is insufficient, and thus finds it unnecessary to pass on the question of whether a more clearly drafted savings clause that nonetheless fails to specifically name the National Labor Relations Board would be sufficient. She notes that she did not participate in *Hobby Lobby Stores, Inc.*, above, and does not pass on whether that case was correctly decided.

[5] Chairman McFerran acknowledges that *Boeing*, above, is currently governing law, and joins the majority in applying that standard for institutional reasons, but adheres to and reiterates her dissent in that case. Here, Chairman McFerran agrees with her colleagues that employees would reasonably construe the Agreement as prohibiting employees from filing charges with the Board, under either the standard set forth in *Boeing* or the previous standard.

ORDER

The National Labor Relations Board orders that the Respondent, Brinker International Payroll Company, L.P., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees would reasonably believe bars or restricts them from exercising the right to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its mandatory arbitration agreement in all its forms, or revise it in all its forms to make clear to employees that it does not bar or restrict employees from exercising their right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise became bound to the unlawful mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Post at all its facilities where the unlawful arbitration agreement is or has been in effect copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent

[6] If facilities where the unlawful arbitration agreement is or has been in effect are open and staffed by a substantial complement of employees, the notice must be posted at those facilities within 14 days after service by the Region. If any facilities where the unlawful arbitration agreement is or has been in effect are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after those facilities reopen and a substantial complement of employees have returned to work, and the notice may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since January 7, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 11, 2021

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Lauren McFerran, Chairman

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all its forms or revise it in all its forms to make clear that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the mandatory arbitration agreement in any form that the mandatory arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

BRINKER INTERNATIONAL PAYROLL COMPANY L. P.

The Board's decision can be found at www.nlrb.gov/case/27-CA-110765 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.